U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 06 September 2005

In the Matter of

EDGAR E. NEEDHAM

Claimant

v. Case No. 2003-BLA-05846

ARCH OF KENTUCKY, INCORPORATED

Employer

and

ARCH MINERALS CORPORATION

Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Party-In-Interest

Appearances:	Edmond Collett, Esq. Edmond Collett, P.S.C. For the Claimant	Ralph Carter, Esq. For the Employer
Before:	William S. Colwell Administrative Law Judge	

DECISION and ORDER DENYING BENEFITS

INTRODUCTION

This proceeding arises from a claim for benefits under the Black Lung Benefits Act (the "Act"), 30 U.S.C. §§ 901 *et. seq*. Benefits under the Act are awarded to coal miners who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of coal miners who were totally disabled due to pneumoconiosis at the time of their deaths (for claims filed prior to January 1, 1982), or whose death was due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a dust disease of the lungs resulting from coal dust inhalation. The Act and its implementing regulations define pneumoconiosis as a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments, arising out of employment in the Nation's coal mines. 30 U.S.C. § 902(b); 20 C.F.R. § 718.201 (2004). In this case, the Claimant, Edgar E. Needham, alleges that he is totally disabled by pneumoconiosis.

The Department of Labor has issued regulations governing the adjudication of claims for benefits arising under the Black Lung Benefits Act at Title 20 of the Code of Federal Regulations. The procedures to be followed and standards applied in filing, processing, adjudicating, and paying claims, are set forth at 20 C.F.R., Part 725, while the standards for determining whether a coal miner is totally disabled due to pneumoconiosis are set forth at 20 C.F.R., Part 718.

I conducted a formal hearing on this claim on August 4, 2004. All parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure before the Office of Administrative Law Judges. 29 C.F.R., Part 18 (2004). At the hearing, Administrative Law Judge Exhibit ("ALJX") 1, Director's Exhibits ("DX") 1-33, Claimant's Exhibits ("CX") 1-3, and Employer's Exhibits ("EX") 1-5 were admitted into evidence without objection. The record was held open after the hearing to allow the parties to submit additional argument. The Claimant and Employer have submitted their closing arguments, and the record is now closed. In reaching my decision, I have reviewed and considered the entire record pertaining to the claim before me, including all exhibits admitted into evidence, the testimony at hearing, and the arguments of the parties.

PROCEDURAL HISTORY

This is Mr. Needham's third claim for benefits under the Act.[1] The Claimant initially filed for benefits on July 22, 1991. DX-1. The District Director denied this claim on December 19, 1991 because it was found that the Claimant failed to establish any element of entitlement. DX-1. The Claimant took no further action on this claim.

[1] The Claimant had filed an occupational disease claim with the Kentucky Workers' Compensation Board, and on January 15, 1992 pursuant to a settlement received a lump sum payment in the amount of $10,096.94 from Arch of Kentucky, and an additional weekly award of $71.27 for period of 425 weeks, to be paid by the Special Fund. This award reflected a 35% occupational disability. DX-10.

The Claimant filed his second claim for benefits on July 5, 1999. DX-2. The District Director denied this claim on October 26, 1999. The District Director found that the Claimant again failed to prove any element of entitlement. DX-2.

This subsequent claim for benefits was filed on February 5, 2002. DX-4. On August 15, 2002, after the initial development of the record, the District Director issued a *Schedule for the Submission of Additional Evidence*. DX-21. The District Director concluded that the Claimant would not be entitled to benefits if a decision on the merits were issued at that time, and also determined that Arch of Kentucky has been correctly named as the responsible operator. On January 27, 2003, the District Director issued a *Proposed Decision and Order - Denial of Benefits*. DX-26. The District Director found that the Claimant had proven the existence of pneumoconiosis, but that he failed to establish total respiratory disability. By letter, dated January 30, 2003, the Claimant requested a formal hearing. DX-27. Pursuant to this request, this claim was referred on May 1, 2003 to the Office of Administrative Law Judges for a hearing as noted above. DX-32.

APPLICABLE STANDARDS

Because Claimant filed this application for benefits after March 31, 1980, the regulations set forth at Part 718 apply. *Saginaw Mining Co. v. Ferda*, 879 F.2d 198, 204, 12 B.L.R. 2-376 (6th Cir.1989). The law of the United States Court of Appeals for the Sixth Circuit governs the adjudication of this claim because the Claimant was last employed in the coal industry in the Commonwealth of Kentucky, within the territorial jurisdiction of that court. *Danko v. Director*, *OWCP*, 846 F.2d 366, 368, 11 B.L.R. 2-157 (6th Cir. 1988). *See Broyles v. Director*, *OWCP*, 143 F.3d 1348, 1349, 21 B.L.R. 2-369 (10th Cir. 1998); *Kopp v. Director*, *OWCP*, 877 F.2d 307, 12 B.L.R. 2-299 (4th Cir. 1989); *Shupe v. Director*, *OWCP*, 12 B.L.R. 1-200 (1989) (*en banc*).

In order to establish entitlement to benefits under Part 718, the Claimant must establish that he suffers from pneumoconiosis, that his pneumoconiosis arose out of his coal mine employment, and that his pneumoconiosis is totally disabling. 20 C.F.R. §§ 718.1, 718.202, 718.203 and 718.204 (2004). *See Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 141, 11 B.L.R. 2-1 (1987); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 708, 22 B.L.R. 2-537 (6th Cir. 2002), *cert. denied*, 538 U.S. 906 (2003). *See also Roberts & Schaefer Co. v. Director, OWCP*, 400 F.3d 992, 998, (7th Cir. 2005).

The Claimant has the burden of proving each element of entitlement to benefits by a preponderance of the evidence. *Director*, *OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 B.L.R. 2A-1 (1994), *aff'g* . *Greenwich Collieries v. Director*, *OWCP*, 990 F.2d 730, 17 B.L.R. 2-64 (3d Cir. 1993). The failure to prove any requisite element precludes a finding of entitlement. *Anderson v. Valley Camp of Utah*, *Inc.*, 12 B.L.R. 1-111 (1989); *Perry v. Director*, *OWCP*, 9 B.L.R. 1-1 (1986) (*en banc*).

ISSUES

At the formal hearing, counsel for the Employer withdrew as contested issues whether Mr. Needham was a miner, and was so employed after 1969. Tr. 12-13. Counsel for the Employer also stated the Employer would withdraw the responsible operator issue if there was no testimony of subsequent coal mine employment. Tr. 12. As there was no such testimony, that issue has been withdrawn. The following issues remain for adjudication:

1. The length of Mr. Needham's coal mine employment.
2. Whether the claim was timely filed.
3. Whether the Claimant has pneumoconiosis as defined in the Act and the regulations.
4. Whether his pneumoconiosis arose out of coal mine employment.
5. Whether the Claimant is totally disabled.
6. Whether any total respiratory disability is due to pneumoconiosis.
7. Whether the Claimant has established a change in an applicable condition of entitlement.

See DX-32.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background and the Claimant's Testimony

The Claimant testified at the formal hearing and also at a deposition that was recorded on May 30, 2002. DX-15. Mr. Needham is 69 years old, and completed 11 years of school. He married his wife, Mary F. Needham, and they remain together. She remains his sole dependent for purposes of the augmentation of benefits. TR. at 14.

The Claimant testified that he was last employed in the mines in April, 1993. His last employer was Arch Minerals. He recounted that he worked for Arch for eight years, and before that for U. S. Steel for seven years. DX-15 at 6-7. At the hearing, he said that he initially worked for Scotia Coal Company in 1977, followed by U. S. Steel from 1978 until 1984, when he started work with Arch of Kentucky. Tr. at 15-16. He retired in 1993. Tr. at 19.

Mr. Needham's last job was classified as an "utilityman," yet he testified that he would be required to perform a range of duties, such as roof bolter, shuttle car driver, continuous miner operator and other heavy tasks, most of it underground. DX-15 at 6-7. TR. at 15. Mr. Needham claimed to have worked a total of 16 years underground. He has performed some independent work as a carpenter.

He had filed a claim for state occupational disease benefits, but apparently received no award pursuant to this filing. He also receives Social Security benefits. DX-15 at 9-10.

The Claimant acknowledged that he currently smokes about one-half pack of cigarettes per day. DX-15 at 11. Tr. at 15. On cross-examination, he was unable to recall that he told physicians in 1991 that he had a more extensive smoking history. Tr. at 27. He also suffered a heart attack two years prior to the deposition, and said that he had pneumonia. He testified that his breathing hampered his ability to work, so that he put in only nine months in the final year of his employment. DX-15 at 13-14. Mr. Needham currently uses two inhalers to breathe as well as heart medicine and medication for diabetes. *Id*. at 15-16. He claimed that he needed to stop to catch his breath while climbing one flight of stairs, and walking about 70-80 feet. DX-15 at 26. *See* Tr. at 22. He also testified that he would awaken three or four times at night with episodes of coughing and wheezing. Tr. at 23.

Mr. Needham recounted that he had been told by a Dr. Anderson that he had "second stage [pneumoconiosis] and [his] breathing was total the same as the other." DX-15 at 17.

LENGTH OF COAL MINE EMPLOYMENT

The Claimant testified to working in the mines from 1977 until 1993. This testimony is consistent with his Social Security earnings statement. Based on my review of the record as a whole, I credit Mr. Needham with 16 years of coal mine employment.

TIMELINESS

In *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 B.L.R. 2-288 (6th Cir. 2001), the court held:

> The three-year limitations clock begins to tick *the first time* that a miner is told by a physician that he is totally disabled by pneumoconiosis. This clock is not stopped by the resolution of the miner's claim or claims, and, pursuant to [*Ross*], the clock may only be turned back if the miner returns to the mines after a denial of benefits. There is thus a distinction between premature claims that are supported by a medical determination ... and those claims that come with or acquire such support. Medically supported claims, even if ultimately deemed "premature" because the weight of the evidence does not support the elements of the miner's claim, are effective to begin the statutory period. Three years after such a determination, a miner who has not subsequently worked in the mines will be unable to file any further claims against his employer, although, of course he may continue to pursue pending claims.

Kirk, 244 F.3d at 608. The Board in *Furgerson v. Jericol Mining, Inc.*, 22 B.L.R. 1-216 (2002) (en banc) concluded that this language constitutes a holding, and not mere dicta, with respect to subsequent claims arising within the territorial jurisdiction of that circuit.

Section 728.308 of the Secretary's regulations in part sets forth a rebuttable presumption that every claim for benefits is timely. 20 C.F.R. § 725.308. I find that this presumption has not been rebutted by evidence of record. I specifically find that there is no clear indication from this record that the Claimant received an adequate medical determination of total disability due to pneumoconiosis. Although the Claimant testified that he had been told by Dr. Anderson that he was disabled, I nevertheless find that the instant subsequent claim is timely, because there is no clear indication that Dr. Anderson's information constituted sufficient assessment of total respiratory disability that was communicated to the Claimant.

MEDICAL EVIDENCE

Chest X-rays

Chest x-rays may reveal opacities in the lungs that are caused by pneumoconiosis and other diseases. Larger and more numerous opacities result in greater lung impairment. The quality standards for chest x-rays and their interpretations are found at 20 C.F.R. § 718.102 (2004) and Appendix A of Part 718. The applicable standards for x-rays taken subsequent to January 19, 2001 are set forth at 20 C.F.R. § 718.102 and Appendix A of Part 718 (2004). The existence of pneumoconiosis may be established by chest x-rays classified as category 1, 2, 3, A, B, or C according to ILO-U/C International Classification of Radiographs. Small opacities (1, 2, or 3) (in ascending order of profusion) may classified as round (p, q, r) or irregular (s, t, u), and may be evidence of "simple pneumoconiosis." Large opacities (greater than 1 cm) may be classified as A, B or C, in ascending order of size, and may be evidence of "complicated pneumoconiosis." A chest x-ray classified as category "0," including subcategories 0/-, 0/0, 0/1, does not constitute evidence of pneumoconiosis. 20 C.F.R. § 718.102(b) (2004).

Physicians' qualifications appear after their names. Qualifications have been obtained where shown in the record by curriculum vitae or other representations, or if not in the record, by judicial notice of the List of A and B-Readers issued by the National Institute of Occupational Safety and Health (NIOSH). If no qualifications are noted for any of the following physicians, it means that I have been unable to ascertain them either from the record or the NIOSH list. Qualifications of physicians are abbreviated as follows: A= NIOSH certified A-reader; B= NIOSH certified B-reader; BCR= board-certified in radiology.

A physician who is "board-certified" has received certification in radiology by the American Board of Radiology or the American Osteopathic Association. 20 C.F.R. §

718.202(a)(1)(ii)(C). *See Staton v. Norfolk & Western Railway Co*., 65 F.3d 55, 57, 19 B.L.R. 2-271 (6th Cir. 1995). A "B reader" is a physician, often a radiologist, who has demonstrated proficiency in reading x-rays for pneumoconiosis by passing annually an examination established by the National Institute of Occupational Safety and Health (NIOSH)[2] and administered by the U.S. Department of Health and Human Services. *See* 20 C.F.R. § 718.202(a)(ii)(E); 42 C.F.R. § 37.51.

Courts generally give greater weight to x-ray readings performed by "B-readers." *See LaBelle Processing Company v. Swarrow*, 72 F.3d 308, 20 B.L.R. 2-76 (3d Cir. 1995). Further, an administrative law judge may properly defer to the readings of the physicians who are qualified as both B-readers and Board-certified radiologists. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985). *See Zeigler Coal Co. v. Director*, *OWCP* [*Hawker*], 326 F.3d 894, 899 (7th Cir. 2003). *See generally Mullins Coal Co. v. Director, OWCP*, 484 U.S. at 145 n. 16; *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 n.2, 18 B.L.R. 2-42 (7th Cir. 1993). Finally, a radiologist's academic teaching credentials are relevant to the evaluation of the weight to be assigned to that expert's conclusions. *See Worhach v. Director*, *OWCP*, 17 B.L.R. 1-105 (1993). An administrative law judge is not required to defer to a radiologist on the basis of academic credentials, however. *Chaffin v. Peter Cave Coal. Co.*, 22 B.L.R. 1-294 (2003). *Cf. Martin v. Ligon Preparation Co.*, 400 F.3d 302, 307 (6th Cir. 2005) (credentials of pulmonary specialist not necessarily superior to those of internist who nevertheless established extensive clinical experience in pulmonary medicine and coal workers' pneumoconiosis).

The following table summarizes the x-ray findings available in this case.

Ex. No.	X-Ray Date Reading Date	Physician	Credentials	Interpretation
DX-12	04-16-02 04-16-02	Simpao		quality 1, 1/0, p,s
DX-13	04-16-02 06-14-02	Sargent	B/BCR	quality 1 (quality only)

[2] NIOSH is the federal government agency that certifies physicians for their knowledge of diagnosing pneumoconiosis by means of chest x-rays. Physicians are designated as "A" readers after completing a course in the interpretation of x-rays for pneumoconiosis. Physicians are designated as "B" readers after they have demonstrated expertise in interpreting x-rays for the existence of pneumoconiosis by passing an examination. Historical information about physician qualifications appears on the U. S. Department of Health and Human Services, List of NIOSH Approved B Readers with Inclusive Dates of Approval [as of] June 7, 2004, found at links on the Office of Administrative Law Judges webpage found at www.oalj.dol.gov/libbla.htm.

EX-4	04-16-02 02-04-04	Wiot	B/BCR[3]	quality 1, no pneumoconiosis
EX-1	06-06-02 06-06-02	Lockey[4]	B	quality 1, no pneumoconiosis
EX-2	06-06-02 06-13-02	Wiot	B/BCR	quality 1, no pneumoconiosis
CX-2	06-06-02 09-22-03	Alexander	B/BCR[5]	quality 1, 1/1, p/q
EX-5	06-06-02 07-05-04	Spitz	B/BCR[6]	quality 1, no pneumoconiosis, but pleural opacities consistent with pneumoconiosis. "[Pleural plaque along the right mid lateral chest wall ... may be due to previous asbestos exposure."

Pulmonary Function Test Evidence

Pulmonary function studies are tests performed to measure obstruction in the airways of the lungs and the degree of impairment of pulmonary function. The greater the resistance to the flow of air, the more severe the lung impairment. The studies range from simple tests of ventilation to very sophisticated examinations requiring complicated equipment. The most frequently performed tests measure forced vital capacity (FVC), forced expiratory volume in one-second (FEV_1) and maximum voluntary ventilation (MVV). The quality standards for pulmonary function studies performed before January 19, 2001, are found at 20 C.F.R. § 718.103 (2000), while the standards

[3] Dr. Wiot has been Professor Emeritus of Radiology, University of Cincinnati, since 1998. Before that time, he has served at the University of Cincinnati as a Professor of Radiology from 1966 until 1998, Associate Professor of Radiology from 1962 until 1966, and Assistant Professor of Radiology from 1962 until 1966. He served as President of the American Board of Radiology from 1980 until 1982, and was Chairman of the Task Force on Pneumoconiosis, American College of Radiology, from 1991 until 1997. EX-2.

[4] Dr. Lockey is an associate professor of the Department of Internal Medicine at the University of Cincinnati College of Medicine. He has served as Editor to the journal Occupational Health and Safety and as Consulting Editor to six other medical journals. EX 3

[5] Dr. Alexander was an Assistant Professor of Radiology and Nuclear Medicine at the University of Maryland from 1988 to 1990. CX-3.

[6] Dr. Spitz has been a Professor of Radiology at the University of Cincinnati since 1971. EX-5. I have not considered this x-ray reading as explained later in this Decision and Order.

applicable to tests administered after that date are set forth at 20 C.F.R. § 718.103 (2004) and Appendix B.

"Pre" and "post" refer to administration of bronchodilators. If only one figure appears, bronchodilators were not administered. In a "qualifying" pulmonary study, the FEV_1 must be equal to or less than the applicable values set forth in the tables in Appendix B of Part 718, and either the FVC or MVV must be equal to or less than the applicable table value, or the FEV_1/FVC ratio must be 55% or less. 20 C.F.R. § 718.204(b)(2)(i) (2004). *See Grundy Mining Co. v. Flynn*, 353 F.3d 467, 471 n. 1, (6th Cir. 2003); *Director, OWCP v. Siwiec*, 894 F.2d 635, 637 n. 5, 13 B.L.R. 2-259 (3d Cir. 1990).

The following chart summarizes the results of the pulmonary function studies available in connection with the subsequent claim.

Ex. No. **Date** **Physician**	**Age** **Height** **Tracings**	**FEV_1** **Pre-/** **Post**	**FVC** **Pre-/** **Post**	**FEV_1/** **FVC** **Pre-/** **Post**	**MVV** **Pre-/** **Post**	**Qualif** **y**	**Impression** **cooperation** **comprehension**
DX-12 04-16-02 Simpao	66 67" Yes	2.99	4.00		95	No	"good" cooperation and comprehension FEV1/FVC ratio reduced; indicates small airway disease
EX-1 06-06-02 McKay (for Dr. Lockey)	66 66.5" Yes	2.21 2.20	3.02 2.87	73.18 76.50	106	No	"probably normal," and no improvement after the administration of a bronchodilator; FVC "just within normal limits" "airway obstruction suggested"

Arterial Blood Gas Studies

Blood gas studies are performed to measure the ability of the lungs to oxygenate blood. A defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. The blood sample is analyzed for the percentage of oxygen (PO_2) and the percentage of carbon dioxide (PCO_2) in the blood. A lower level of oxygen (O_2) compared to carbon dioxide (CO_2) in the blood indicates a deficiency in the transfer of gases through the alveoli which may leave the miner disabled. The quality standards for arterial blood gas studies performed before January 19, 2001, are found

at 20 C.F.R. § 718.105 (2000), while the quality standards for tests conducted subsequent to that date are set forth at 20 C.F.R. § 718.105 (2004). The following chart summarizes the arterial blood gas studies available in this case. A "qualifying" arterial gas study yields values that are equal to or less than the applicable values set forth in the tables in Appendix C of Part 718. If the results of a blood gas test at rest do not satisfy Appendix C, then an exercise blood gas test can be offered. Tests with only one figure represent studies at rest only. Exercise studies are not required if medically contraindicated. 20 C.F.R. § 718.105(b) (2000); 20 C.F.R. § 718.105(b) (2004).

The following arterial blood gas study evidence has been admitted into the record.

Exhibit Number	Date Altitude	Physician	pCO_2 at rest/ exercise	pO_2 at rest/ exercise	Qualify	Impression
DX-12	04-16-02 <2999'	Simpao	40.6	92.2	No	"normal arterial blood gas"

Medical Opinions

Medical opinions are relevant to the issues of whether the miner has pneumoconiosis, and whether the miner is totally disabled. A determination of the existence of pneumoconiosis may be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis as defined in 20 C.F.R. § 718.201. 20 C.F.R. § 718.202(a)(4) (2004). Thus, even if the x-ray evidence is negative, medical opinions may establish the existence of pneumoconiosis. *Taylor v. Director, OWCP*, 9 B.L.R. 1-22 (1986). *See Martin v. Ligon Preparation Co.*, 400 F.3d at 306. The medical opinions must be reasoned and supported by objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. 20 C.F.R. § 718.202(a)(4) (2004).

Where total disability cannot be established by pulmonary function tests, arterial blood gas studies, or cor pulmonale with right-sided heart failure, or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may be nevertheless found, if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable and gainful work. 20 C.F.R. § 718.204(b)(2)(iv) (2004). With certain specified exceptions, the cause or causes of total disability must be established by means of a physician's documented and reasoned report. 20 C.F.R. § 718.204(c)(2) (2004). Quality standards for reports of physical examinations performed before January 19, 2001, are found at 20

C.F.R. § 718.104 (2000), while the applicable standards for physical examinations coming after that date are set forth at 20 C.F.R. § 718.104 (2004).

The record contains the following medical opinions relating to this case.

Dr. Valentino S. Simpao

Dr. Simpao examined the Claimant at the request of the Department of Labor on April 16, 2002. DX-12. Mr. Needham recounted a history of wheezing attacks since 1990, diabetes and high blood pressure. He told Dr. Simpao that he had been hospitalized for congestive heart failure. He also related that he had been smoking cigarettes since 1991 at the rate of 1/2 pack per day. The Claimant's current complaints included wheezing, a productive cough, dyspnea on exertion, chest pain, orthopnea, edema and paroxysmal nocturnal dyspnea, which causes shortness of breath and forces him awake 3-4 times per night. Mr. Needham said that he was limited by shortness of breath to walking 200 feet, one flight of stairs and lifting 40-50 pounds.

On physical examination, Dr. Simpao detected on the chest examination "tactile fremitus," "increased resonance" of the upper chest and "auxiliary areas." He observed crepitation and forced expiratory wheezes on auscultation. There was no clubbing or edema.

Dr. Simpao diagnosed "CWP 1/0" that arose out of the Claimant's "multiple years of coal dust exposure" which he thought was "medically significant in his pulmonary impairment." He also justified his diagnosis not only on the chest x-ray but also on an "EKG and pulmonary function test along with physical findings and symptomatology." The doctor assessed a "mild impairment," and opined that this impairment rendered the Claimant without the respiratory capacity to perform the work of a coal miner or comparable dust-free work. He reiterated his explanation of objective findings on the history and physical examination along with x-ray and clinical testing.

Dr. Simpao's CV does not demonstrate that he is board certified. CX-1. Claimant's post hearing brief indicates, however, that this physician is board certified in internal medicine and pulmonary disease. For the purposes of deciding this case, I am not crediting Dr. Simpao with being board certified in internal medicine and pulmonary disease since there is not evidence in the record to support this. Even if I would have found Dr. Simpao had such qualifications, such a finding would not be significant enough based on the other evidence of record to change any findings.

Dr. James E. Lockey

Dr. Lockey evaluated the Claimant on June 6, 2002 at the Employer's request, and presented his conclusions in a report dated July 25, 2002. EX-1.

The Claimant told Dr. Lockey that he had been in normal health until 15 years before this medical examination, when he began to develop shortness of breath on exertion. Mr. Needham claimed that this dyspnea was progressive in nature, and that he now becomes short of breath after waling up five steps or along level ground for 70 feet. Mr. Needham complained of a morning productive cough in which he brings up about 1/2 cup of "grayish black sputum." He did not complain of wheezing, but informed Dr. Lockey that he uses two inhalers that aid in his breathing. Mr. Needham claimed that he smoked from age 52 until 66 at the rate of 1/2 pack per day, resulting in a 7 pack/year smoking history. The review of systems disclosed atherosclerosis with angina, a weekly episode of chest pain. Mr. Needham also uses two pillows to sleep, and awakens every two hours or so at night, and has occasional edema. Dr. Lockey recorded a coal mine employment history beginning in 1977 and ending in 1993. The Claimant told him that he started with Scotia Coal as a rock duster and roof bolter. He later worked as a roof bolter, scoop operator, shuttle car operator, ventilation person, miner and miner helper.

On physical examination of the chest, Dr. Lockey observed "some scattered mid and late inspiratory sounding crackles noted involving lateral bases bilaterally, [but] no prolonged expiratory phase or wheezing[.]" "No clubbing, cyanosis or edema [was] noted." Dr. Lockey took a chest x-ray which he read as negative and which in turn was reread by as negative Dr. Wiot. Both interpretations were negative. He also administered a pulmonary function study and recorded the carboxyhemoglobin level. The latter test indicated "current exposure to combustion products."

Dr. Lockey concluded as follows:

> Based on currently available clinical information, Mr. Needham does not have chest radiographic findings consistent with coal workers' pneumoconiosis. His chest films do not demonstrate any changes consistent with coal workers' pneumoconiosis or other type of occupational pulmonary disorders, and would be considered normal from a pneumoconiosis perspective, profusion category 0/0. Pulmonary function parameters are normal in relationship to the forced vital capacity value and MVV as well as FEV1/FVC ratio, but do demonstrate a mild reduction in the FEV1 parameter. Pulmonary function parameters are above the Federal standards. Overall, there does not appear to be any objective evidence of any type of occupational pulmonary disorder.
>
> From a pulmonary perspective, Mr. Needham is medically qualified to do his normal job tasks in the coal mining industry or similar type job tasks in a dust free environment.

EX-1. Dr. Lockey is board certified in internal medicine with a subspecialty in pulmonary disease, is a B-reader, and is an Associate Professor and Director of the

Occupational and Environmental Medicine Division of the Institute of Environmental Health at the University of Cincinnati. EX-1, EX-3.

Physician Deposition Testimony

Deposition Testimony of Dr. Wiot

Dr. Wiot's September 18, 2002 deposition testimony (DX-23) was admitted without objection. He outlined his extensive credentials in the field of diagnostic radiology, and spoke of his review of the Claimant's June 6, 2002 chest x-ray. However, I have not considered Dr. Wiot's deposition testimony. See *Tapley v. Bethenergy Mines, Inc.*, BRB No. 04-0790 BLA (May 26, 2005) (unpub.) in which the Board found that Dr. Wiot's deposition testimony was properly excluded because it only offered chest x-ray interpretations and did provide a medical opinion. The Board found that Section 725.414(c) provided that "[a] physician who prepared a medical report admitted under this section may testify with respect to the claim . . . by deposition." Because Dr. Wiot had offered only chest ray interpretations and did not provide a medical opinion, then his deposition testimony was not admissible.

I have considered the evidence submitted concerning Dr. Wiot at EX-2 and EX-4.

Deposition Testimony of Dr. Lockey

Dr. Lockey testified on September 19, 2002. EX-3. His testimony essentially tracked the discussion presented in his medical opinion report based on the June 6, 2002 pulmonary evaluation. With respect to the pulmonary function testing, Dr. Lockey reported that the results were "within lower limits of normal for the FVC parameter and slightly reduced in regard to the FEV1 parameter." EX-3 at 14. He said that the "results demonstrated no significant response to bronchodilators." The carboxyhemoglobin level was 4.6, consistent with cigarette smoking.

Dr. Lockey opined that Mr. Needham retains the respiratory and physiological capacity to do his usual and customary level of coal mining work. *Id*. at 16.

He also explained that the abnormalities on examination of the chest would be consistent with the Claimant's history of asthma and smoking. *Id*. at 17. On cross-examination, Dr. Lockey agreed that the Claimant's coal mine work history would be sufficient for the development of coal workers' pneumoconiosis. He explained that the reduced FEV1 result in the pulmonary function testing "could be a normal finding" or a result of an underlying asthmatic condition or bronchitic condition due to smoking. Dr. Lockey suspected that the breathing medications most likely were to address "some type of airway inflammation, such as you see with asthma." *Id*. at 19. The crackles detected on physical examination of the chest were "[n]ot generally" found in patients with coal workers' pneumoconiosis, but rather in cases of "asbestos or some other type of lower lobe interstitial lung disease such as scleroderma or rheumatoid lung." *Id*. The

elevated carboxyhemoblobin level could be attributed to combustion exposure other than smoking.

DISCUSSION

"Material Change in Conditions"

After the expiration of one year from the denial of the previous claim, a subsequent claim must be denied on the basis of the prior denial unless a miner demonstrates with the submission of additional material that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final. 20 C.F.R. § 725.309(d)(2004).

To assess whether this change is established, the administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Sharondale Corp. v. Ross*, 42 F.3d 993, 997-98, 19 B.L.R. 2-10 (6th Cir. 1994). The Board has ruled that the focus of the material change standard is on specific findings made against the miner in the prior claim; an element of entitlement which the prior administrative law judge did not explicitly address in the denial of the prior claim does not constitute an element of entitlement "previously adjudicated against a claimant." *See Allen v. Mead Corp.*, 22 B.L.R. 1-63 (2000) (*en banc*). If a claimant establishes the existence of that element, he has demonstrated, as a matter of law, a change in the applicable conditions of entitlement in a subsequent claim, and would then be entitled to a full adjudication of his claim based on the record as a whole. *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 608, 22 B.L.R. 2-288 (6th Cir. 2001); *Cline v. Westmoreland Coal Co.*, 21 B.L.R. 1-69 (1997). In order to meet the threshold requirement for a duplicate or subsequent claim, the newly submitted evidence must also differ qualitatively from the previously submitted evidence. *See Grundy Mining Co. v. Director*, *OWCP* [*Flynn*], 353 F.3d 467, 23 B.L.R. 2-44 (6th Cir. 2003); *Chaffin v. Peter Cave Coal Co.*, 22 B.L.R. 1-294 (2003).

In this case, the previous claim was denied by the District Director because the Claimant failed to establish any element of entitlement. Accordingly, the Claimant may establish a change in an applicable condition of entitlement by proving any one of the elements of entitlement.

Pneumoconiosis

For purposes of the Act, pneumoconiosis means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment. A disease arising out of coal mine employment includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. 30 U.S.C. § 902(b); 20 C.F.R. § 718.201.

Because this claim arises within the territorial jurisdiction of the Sixth Circuit, the Claimant may establish the existence of pneumoconiosis under any one of the alternate methods set forth at 20 C.F.R. § 718.202(a). *Cornett v. Benham Coal*, *Inc.*, 227 F.3d 569, 575, 22 B.L.R. 2-107 (6th Cir. 2000). *See Furgerson v. Jericol Mining, Inc.*, 22 B.L.R. 1-216 (2002) (en banc). There are four methods for determining the existence of pneumoconiosis. Under 20 C.F.R. § 718.202(a)(1), a finding that pneumoconiosis exists may be based upon x-ray evidence. A claimant may establish the presence of pneumoconiosis at Section 718.202(a)(2), upon the basis of autopsy or biopsy evidence. Section 718.202(a)(3) provides that pneumoconiosis may be established if any one of several cited presumptions apply. The Secretary's regulations also provide that a miner may establish the existence of pneumoconiosis under Section 718.202(a)(4) on the basis of a medical opinion diagnosis of pneumoconiosis, notwithstanding a negative x-ray. 20 C.F.R. § 718.202(a)(4).

X-Ray Evidence pursuant to 20 C.F.R. § 718.202(a)(1)

The subsequent claim record contains the interpretations of two chest x-rays. The first film was taken on April 16, 2002 and read as positive by Dr. Simpao. DX-13. This film was reread for quality by Dr. Sargent. DX-13. On February 14, 2004, Dr. Jerome Wiot reread this film as negative for pneumoconiosis. EX-4. I find that the Claimant has failed to establish that this film is positive for pneumoconiosis. I defer to the negative interpretation by Dr. Wiot, who holds superior qualifications in the field of radiology as a board-certified radiologist and B-reader, and who has extensive academic experience. *See Worhach*.

The second x-ray was taken on June 6, 2002, and was interpreted as negative by Dr. Lockey. EX-1. This film was reread as negative by Dr. Wiot.[7] EX-2. The Claimant has submitted the positive rereading of this film by Dr. Alexander, who possesses dual credentials as a board-certified radiologist and B-reader. Upon consideration of these three readings, I find that this film does not constitute a positive film. I consider Dr. Wiot's credentials and experience to be superior to those of Dr. Alexander. At the most, I find that the readings of this film are equally probative.

Based on the above chest x-ray evidence, I find that the Claimant has failed to establish that he suffers from pneumoconiosis at Section 718.202(a)(1) on the basis of the subsequent claim evidence. I find that, viewing the readings of the films qualitatively as well as quantitatively, *see Woodward v. Director*, *OWCP*, 991 F.2d 314, 321, 17

[7] The Employer has submitted, as rebuttal evidence the negative interpretation of the June 6, 2002 x-ray by Dr. Harold Spitz. EX-4. Although apparently offered in rebuttal of the x-ray rereading by Dr. Alexander, CX-2, I conclude that on further reflection that Dr. Spitz's rereading is not authorized by the Secretary's amended regulations. *See* 20 C.F.R. § 725.414(a)(3)(ii).

B.L.R. 2-77 (6th Cir. 1993), that the x-ray evidence does not establish that Mr. Needham suffers from pneumoconiosis.

Biopsy or Autopsy Evidence pursuant to 20 C.F.R. § 718.202(a)(2)
Applicable Presumptions

The Claimant cannot establish pneumoconiosis at Section 718.202(a)(2), because the subsequent claim record contains no evidence relevant to that provision, and is likewise precluded from the presumptions accorded under Section 718.202(a)(3), because there is no evidence of complicated pneumoconiosis, and Sections 718.305 and 718.306 are foreclosed because this claim was filed after January 1, 1982.

Medical Opinion Evidence pursuant to 20 C.F.R. § 718.202(a)(4)

The final provision under which the Claimant may establish the existence of pneumoconiosis on this subsequent claim is at Section 718.202(a)(4), on the basis of a medical opinion diagnosis of the disease. A qualifying diagnosis could not only be "clinical" pneumoconiosis, as that disease process is ordinarily diagnosed in the clinical setting, but also "legal" pneumoconiosis. Pneumoconiosis is defined broadly under the Act, and any pulmonary or respiratory impairment significantly related to, or substantially aggravated by, the Claimant's coal mine dust exposure will qualify as the disease. *See generally Southard v. Director, OWCP*, 732 F.2d 66, 6 B.L.R. 2-26 (6th Cir. 1984).

Dr. Simpao rendered a positive diagnosis of pneumoconiosis, specifically noting "CWP 1/0," and explaining his conclusion on the basis of the Claimant's coal mine dust exposure, his physical examination, patient symptoms and clinical testing. Although I consider Dr. Simpao's examination and associated conclusions to be an adequate pulmonary evaluation, I nevertheless find that his medical opinion does not persuasively establish that Mr. Needham has either clinical or "legal" pneumoconiosis as that disease is broadly defined under the Act and its implementing regulations.

First, the chest x-ray upon which Dr. Simpao in part relies has been reread as negative by a radiologist. While a medical opinion diagnosis of pneumoconiosis shall be sufficient evidence of pneumoconiosis notwithstanding negative x-ray, *see Taylor v. Director, OWCP*, 9 B.L.R. 1-22 (1996), where x-ray evidence constitutes an apparent major part of the physician's documentation, his opinion may suffer diminished probative weight if that film has been reread as negative. *See generally Director, OWCP v. Rowe*, 710 F.2d 251, 255 n. 6, 5 B.L.R. 2-99 (6th Cir. 1983). Second, while a positive x-ray is not necessary, given a physician's examination and reliance on other clinical tests, I find that Dr. Simpao does not persuasively establish that Mr. Needham suffers from a pulmonary or respiratory impairment significantly related to or substantially aggravated by Mr. Needham's coal mine dust exposure. The focus of his diagnosis and of his medical opinion is on the clinical pneumoconiosis as portrayed in the positive chest x-ray. Third, I find that the countervailing opinion by Dr. Lockey, with

his associated deposition testimony, is more detailed in its treatment and more adequately covers the positive findings on his physical examination of the chest. Dr. Lockey, for example, discusses the results of pulmonary function testing in some detail, and duly notes the implications of the positive pulmonary findings on his physical examination.

In the final analysis, taking into account the "qualifications of the respective physicians, the explanations of their medical opinions, the documentation underlying their medical judgments and the sophistication and bases of their diagnoses," *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 B.L.R. 2-269 (4th Cir. 1997), I am most persuaded by the opinion by Dr. Lockey, who explained why the pulmonary findings on physical examination are not derived from Mr. Needham's coal mine dust exposure. His opinion is extensively documented, and his conclusions more adequately explained, especially when subjected to deposition questioning. *See generally Clark v. Karst-Robbins Corp.*, 12 B.L.R. 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 B.L.R. 1-46 (1985). *See also Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 950-951, 21 B.L.R. 2-23 (4th Cir. 1997).

Because the Claimant has failed to establish the existence of pneumoconiosis under any method available at Section 718.202(a), I find that he has not established the existence of pneumoconiosis on the basis of the subsequent claim evidence.

Total Respiratory Disability

I also find that the Claimant has not established the presence of a totally disabling pulmonary or respiratory impairment on the basis of the subsequent claim evidence. 20 C.F.R. § 718.204(b). A miner is considered totally disabled if he has complicated pneumoconiosis, 30 U.S.C. § 921(c)(3), 20 C.F.R. § 718.304, or if he has a pulmonary or respiratory impairment to which pneumoconiosis is a substantially contributing cause, and which prevents him from doing his usual coal mine employment and comparable gainful employment, 30 U.S.C. § 902(f), 20 C.F.R. § 718.204(b) and (c).

The Claimant testified that he performed a number of tasks requiring heavy work -- including roof bolter and the operator of different types of mining machinery. I find that his employment was strenuous heavy labor.

The Regulations provide a number of methods to show total disability other than by the presence of complicated pneumoconiosis: (1) pulmonary function studies; (2) blood gas studies; (3) evidence of cor pulmonale; (4) reasoned medical opinion; and (5) lay testimony. 20 C.F.R. §§ 718.204(b) and (d) (2004). Lay testimony may also constitute relevant evidence. *See Madden v. Gopher Mining Co.*, 21 B.L.R. 1-122 (1999). A finding of total disability due to pneumoconiosis cannot be made solely on the miner's statements or testimony, however. 20 C.F.R. § 718.204(d) (2002). *See Tedesco v. Director, OWCP*, 18 B.L.R. 1-103 (1994). I emphasize that *any* loss in lung

function may qualify as a total respiratory disability under Section 718.204(b)(2). *See Carson v. Westmoreland Coal Co.*, 19 B.L.R. 1-16 (1964), *modified on recon*. 20 B.L.R. 1-64 (1996).

There is no evidence in the record that Claimant suffers from complicated pneumoconiosis or cor pulmonale. Further, I find that Claimant has failed to demonstrate total respiratory disability at 20 C.F.R. §§ 718.204(b)(i) or (ii). Not one of the ventilatory or arterial blood gas tests produced results that qualify under the Secretary's regulations.

The final provision under which a miner can prove that he suffers from a total pulmonary or respiratory disability is on the basis of a reasoned medical opinion. At the outset, I find that Dr. Simpao's opinion, that the Claimant suffers from a "mild" pulmonary or respiratory impairment, does constitute an assessment of total respiratory disability because Dr. Simpao specifically opined that this level of impairment would preclude Mr. Needham from returning to his former coal mine employment.

Notwithstanding Dr. Simpao's assessment of total respiratory disability, I nevertheless find that the Claimant has failed to demonstrate total respiratory disability at Section 718.204(b)(iv). The objective clinical studies administered by Dr. Simpao do not demonstrate qualifying values under the Secretary's regulations. Although a medical opinion of total disability does not require objective support from the physician's clinical testing, *see Cornett*, 227 F.3d at 57, the results of such testing forms part of the underlying clinical documentation for their opinions, and has an impact on the comparative weight that would be assigned to that opinion. *See Clark v. Karst-Robbins Corp.*, 12 B.L.R. 1-149 (1989) (*en banc*); *Lucostic v. United States Steel Corp.*, 8 B.L.R. 1-46 (1985).

I find that the medical opinion by Dr. Lockey is a better documented and reasoned assessment of the nature and extent of the Claimant's pulmonary or respiratory disability. His opinion is supported overall by the clinical documentation in the subsequent claim record, and is more thorough in its analysis. In sum, I credit the opinion of Dr. Lockey, that Mr. Needham is not precluded from returning to the mines, over the contrary opinion by Dr. Simpao. Even considering the Claimant's testimony, *see generally Onderko v. Director, OWCP*, 14 B.L.R. 1-2 (1988), including his use of medications for his breathing, I nonetheless find that he has not demonstrated total respiratory disability on the basis of the subsequent claim evidence at Section 718.202(b)(2)(iv).

Finally, after independently weighing all relevant evidence pursuant to 20 C.F.R. ' 718.204(b)(2), like and unlike, including lay testimony, and considering the heavy exertional requirements of a roof bolter and associated coal mine tasks, I nevertheless find that the Claimant has not established total respiratory disability. *See Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195 (1986), *aff'd on recon. en banc*., 9 B.L.R. 1-236 (1987). *See also Poole v.*

Freeman United Coal Mining Co., 897 F.2d 888, 894, 13 B.L.R. 2-348 (7th Cir. 1990). In the final analysis, the conflicting opinion of Dr. Lockey, as well as the non-qualifying clinical tests of record, constitute contrary probative evidence that precludes the Claimant from establishing total respiratory disability.

CHANGE IN APPLICABLE CONDITION OF ENTITLEMENT

Because I have found that the Claimant has failed to establish either the presence of pneumoconiosis or total respiratory disability on the basis of the subsequent claim evidence, I must find that he has not proven a change in an applicable condition of entitlement that had been adjudicated against him in the prior claim.

Further, I conclude as well that the newly submitted evidence offered in support of the claim does not differ qualitatively from the previously submitted evidence. *See Grundy Mining Co. v. Director*, *OWCP* [*Flynn*]; *Chaffin v. Peter Cave Coal Co.* On this basis as well I must find benefits must be denied pursuant to Section 725.309(d), even if there were no countervailing evidence submitted by the Employer.

ATTORNEY'S FEES

The award of an attorney's fee under the Act is permitted only in cases in which Claimant is found entitled to benefits. Since benefits are not awarded in this case, the Act prohibits the charging of attorney's fees to the Claimant for representation services rendered in pursuit of the
claim.

ORDER

The claim of Edgar E. Needham for benefits under the Act is denied.

A
WILLIAM S. COLWELL
Administrative Law Judge

Washington, D.C.
WSC:dj

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 (thirty) days from the date of this Decision by filing a Notice of Appeal with the **Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601**. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.